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October 20, 2004

Hon. Vernon Williams  
Secretary  
U.S. Department of Transportation  
Surface Transportation Board  
1925 K Street  
Washington, D.C. 20006

VIA FED EX

Re: STB Docket No. AB-156 (Sub. No. 25X)

Dear Secretary Williams:

Enclosed please find the original and twelve copies of the Protest of the Owego Harford Railway, Inc, to the Petition for Exemption by the Delaware & Hudson Railway, Inc in the above cited abandonment docket. Please file the original and ten copies and return two copies time and date stamped in the enclosed self addressed envelope.

Thank you for your courtesy and cooperation in this regard.

Very truly yours,

Eric B. Lee  
Attorney for the Owego Harford Railway, Inc.

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Docket No. AB-156 (Sub No. 25X)  
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DELAWARE AND HUDSON RAILWAY COMPANY, INC. DISCONTINUANCE OF  
TRACKAGE RIGHTS BETWEEN LANESBORO, PA AND BUFFALO, NY IN  
SUSQUEHANNA COUNTY, PA AND BROOME, TIOGA, CHEMUNG, STUEBEN,  
ALLEGANY, LIVINGSTON, WYOMING, ERIE AND GENESEE CONTIES, NY

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PROTEST OF OWEGO HARFORD RAILWAY, INC,  
TO PETITON FOR EXEMPTION  
VERIFIED STATEMENT OF STEVEN MAY  
\_\_\_\_\_

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Dated: October 20, 2004

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Owego Harford Railway, Inc.

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Docket No. AB-156 (Sub No. 25X)



DELAWARE AND HUDSON RAILWAY COMPANY, INC, DISCONTINUANCE OF  
TRackage RIGHTS BETWEEN LANESBORO, PA, AND BUFFALO, NY, IN  
SUSQUEHANNA COUNTY, PA AND BROOME, TIOGA, CHEMUNG, STEUBEN,  
ALLEGANY, LIVINGSTON, WYOMING, ERIE AND GENESEE COUNTIES, NY

PROTEST OF OWEGO HARFORD RAILWAY, INC.  
TO PETITION FOR EXEMPTION

The Owego Harford Railway, Inc protests to the Petition for Exemption of  
Discontinuance filed by the Delaware and Hudson Railway, Inc on October 1, 2004 in the  
above entitled proceeding, as follows:

**STATEMENT OF FACTS**

The Delaware and Hudson Railway Company, Inc (DH), a subsidiary of the Canadian Pacific Railway (CPR) has filed an application in this matter to discontinue trackage rights over approximately 230 miles of track as part of a larger transaction between CPR and the Norfolk Southern Railway Company. In addition to the instant application there are two related matters *Canadian Pacific Railway Company-Trackage Rights Exemption* Finance Docket No. 34561, and *Norfolk Southern Railway Company-Trackage Rights* Finance Docket No. 34562. These coordinated actions are all coordinated under a non-binding Memorandum of Understanding (MOU). The scope of these proposed transactions is substantial involving trackage rights over nearly 400 miles of track.

The Owego Harford Railway, Inc (OHRY) is a Class III railroad authorized by the Interstate Commerce Commission to commence operations on May 1, 1992. (ICC Finance Docket No. 32063). OHRY operates approximately 26.7 miles of track between Owego, New York and Harford Mills, New York located in Tioga and Cortland Counties,

NY. OHRV connects with the Southern Tier Line of the Norfolk Southern Railway (NS) at Owego, NY. OHRV interchanges with both the NS and the Petitioner Delaware and Hudson Railway, Inc (DH) at Owego, NY. The interchange track is located at MP 236.1 on the NS Southern Tier Line. The DH reaches Owego from Binghamton, NY approximately 23 miles to the east over the trackage rights DH seeks to discontinue in this matter.

Interchange traffic moved by DH over the Owego interchange recently has included: rock salt from a nearby mine owned by Cargill, Inc, scrap metal from Upstate Shredding, LLC, and LPG gas moving to/from Enterprise Products storage facility. The level of traffic can vary widely by season and commodity. Traffic interchanged between OHRV and DH has ranged between 35 and 889 carloads annually over the last three years. Total traffic moving over the OHRV for the same period ranged between 1,556 and 1,664 carloads.

Currently, DH provides service to the Owego interchange as traffic requires by a local train originating in Binghamton, NY. The DH local enters NS track at or near CP BD an interlocking located at MP 213.2 on the NS Southern Tier Line and travels west to the OHRV interchange track at MP 236.1 a distance of approximately 23 miles.

Historically, OHRV's customers have benefited from the connecting service of two Class I railroads the DH and Consolidated Rail Corporation (Conrail) and its successor on the Southern Tier Line, the NS, during the entire time OHRV has operated the rail line. The DH and its predecessor the Delaware and Hudson Railroad Company (D&H) have served Owego via trackage rights dating to long before the formation of Conrail in 1976. The D&H and the Lehigh Valley Railroad (LV), a Conrail predecessor operated transfer trains between Binghamton and the LV major classification yard at Sayre, PA over some of the same trackage that is now part of the OHRV. During much of the 1980s the D&H also operated the line now operated by OHRV after the line was excluded from Conrail.

In this proceeding, DH proposes to discontinue service to the Owego interchange via trackage rights upon approval of its exemption request by the STB. Specifically DH proposes to eliminate trackage rights service between Binghamton at MP 217.0 and Buffalo at MP 417.8. (See *DH Petition for Exemption* filed herein, p.1) Further, DH proposes to substitute service under the “Southern Tier Haulage Services Agreement” with the NS wherein only the NS will actually provide service to the Owego interchange for a fee and interchange the traffic to the DH at its facility in East Binghamton, NY. (See *DH Summary of Documents*, p.12, filed herein on October 12, 2004).

## **ARGUMENT**

### **DISCONTINUANCE OF TRACKAGE RIGHTS MUST BE IN THE PUBLIC CONVENIENCE AND NECESSITY**

Under 49 U.S.C. 10903(d) any discontinuance of trackage rights must be deemed by the Board to be in the public convenience and necessity. The Board may exempt such a discontinuance from formal regulation if it finds that such regulation is not necessary to carry out the rail transportation policy of 49 U.S.C Section 10101 and that the transaction or service is of limited scope, or regulation is not necessary to protect shippers from the abuse of market power. 49 U.S.C. Section 10502(a). OHRY contends that this transaction limits competition and is not in the spirit of the Rail Transportation Policy and further is not of limited scope and regulation is necessary to curb the possibility of abuse.

#### **The Rail Transportation Policy encourages competition**

The Rail Transportation Policy provides “to allow to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail”. 49 U.S.C. Section 10101(1). The proposed DH discontinuance will have a detrimental effect on rail competition in the Southern Tier area of New York.

DH contends its proposed discontinuance of trackage rights will not affect customers along the Southern Tier Line as it does not provide direct service to customers. (DH Petition, p. 2) Despite this, DH is the only competitive interchange service for several short lines connecting to the Southern Tier Line including OHRY. Of the group identified in the DH Petition, three short lines including OHRY will be left with only service provided by the NS in the event the DH discontinuance becomes effective.

The discontinuance proposed will harm the customers and connecting short lines by lessening competition in the region. In its Petition, DH notes that when its predecessor was granted the trackage rights at issue over what was then Conrail it represented the sole rail competition in the Northeast. (DH Petition p.2; citing, *Canadian Pacific Limited et al.-Purchase and Trackage Rights-Delaware and Hudson Railroad Co.*, 7 I.C.C 2d 95 (1990)). For the OHRY and others along the Southern Tier DH remains the only rail competition to the NS which acquired the Southern Tier Line and connecting branches serving the area in 1999. (See *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company--Control and Operating Leases/Agreements--Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388). Although DH contends there is significant trucking and rail competition in the "Northeast", a review of area rail maps reveals that the nearest Class 1 railroads other than the NS are CSX to the north which has no connections south in OHRY's immediate area and DH itself. Moreover, trucking is not a realistic alternative for OHRYs customers who move bulk products that cannot be economically be moved by truck if such trucks are even available. Thus, a loss of DH service to Owego will deprive OHRYs present and future customers of dual Class 1 service absent action by the STB.

DH proposes to discontinue service to the Owego interchange via trackage rights upon approval of its exemption request by the STB. Specifically DH proposes to eliminate trackage rights service between Binghamton at MP 217.0 and Buffalo at MP 417.8. (See DH Petition, p.1) Further, DH proposes to substitute service under the "Southern Tier Haulage Services Agreement" with the NS wherein only the NS will actually provide

service to the Owego interchange for a fee and interchange the traffic to the DH at its facility in East Binghamton, NY. (See DH *Summary of Documents*, p.12, filed herein on October 12, 2004). The OHR Y interchange at Owego is located at MP 236.1 in the midst of the trackage rights DH seeks to discontinue.

The Haulage Services provided by NS to DH will be under an agreement not subject to STB jurisdiction. Such an agreement, although apparently able by its terms to be renewed perpetually, must also have provisions for termination. Such an agreement could be terminated by the parties leaving OHR Y and its shippers without further recourse to the STB upon such termination. Despite the DH claims that it will continue to market traffic in the area the actual carloads moved by DH across the Owego interchange decrease each of the last 3 years as overall OHR Y traffic has remained nearly constant. Given this history and the ability of DH to withdraw from the area if the exemption herein is granted by canceling the Haulage Services Agreement at some future date OHR Y contends that the intent of the transportation policy set forth in 49 U.S.C. Section 10101 are not served by an exemption of this proceeding.

#### **The Proposed Discontinuance is not of limited scope**

The proposed discontinuance involves approximately 230 miles of trackage rights. It is one of three coordinated filings affecting approximately 400 miles of track throughout New York. Also involved are numerous customers located on connecting railroads that rely upon DH to move their goods and provide car service and the full range of services to support their rail traffic that are customarily provided by Class 1 railroads. As outlined above, even the relatively small OHR Y has several customers that use DH rail service over the existing trackage rights.

#### **Regulation may be necessary to protect shippers**

OHR Y is concerned, as noted above that the DH may at some future date decide to cease all service over the Southern Tier Line, whether by trackage or haulage rights. Such an

action would leave only the NS as a Class 1 rail carrier serving all connecting lines and their customers including OHRY and would leave those affected without notice and an opportunity to be heard before the Board. This proceeding seems to be the only such opportunity.

DH proposes to substitute haulage services provided by NS for the current DH Trackage Rights. (DH Petition p.5-6). The haulage services will be priced by agreement between DH and NS (DH Petition p.13). The haulage services to be provided by NS to DH will not be subject to the jurisdiction of the STB and the parties may adjust their agreement without STB approval including potentially curtailing such agreements as it suits them, unlike the existing trackage rights. (See, 49 CFR 1180)

The DH argues that it does not possess market dominance in the area and that as a result it cannot harm shippers. No where in its Petition does DH address the possible after affect of its discontinuance which will leave the NS as the dominant and indeed only effective Class 1 railroad in the Southern Tier area.

Factually, the effort by DH to discontinue its trackage rights over the Southern Tier Line will harm competition for the customers served by OHRY. Customers such as Cargill, that already has direct NS rail service to their mine in Lansing, NY via the NS Ithaca Secondary Track, have opened transloading operations on the OHRY in large measure to gain the competitive advantage of having service provided by a second Class I railroad. If DH is permitted to relinquish its trackage rights this competitive advantage will be lost. Other OHRY customers moving goods such as LPG gas, scrap metal and plastic will also lose competitive service for their commodities.

Accordingly, OHRY argues that the discontinuance of trackage rights requested by DH is not in the interests of the Rail Transportation Policy and is not in the public convenience and necessity and is neither limited in scope nor does it provide the necessary protection to shippers or connecting short lines.

**CONTINUED DH LOCAL SERVICE TO OHRY INTERCHANGE IS A  
MINIMAL BURDEN**

DH contends that it suffers from various financial ills which render continued operations over the Southern Tier Trackage Rights not financially viable. The cost of operating a single local train once weekly, as needed, over the 23 miles from Owego to Binghamton is not overly burdensome on a large railroad such as the DH. If the cost of the NS Haulage Services that DH pays and is passed on to the customer is not substantially different than the existing trackage rights fees, it would seem that there is no reason to discontinue the interchange service to Owego.

Accordingly, OHRY respectfully requests the Surface Transportation Board grant To OHRY the specific relief requested below. Further, OHRY reserves the right to amend this pleading as additional information becomes available.

### CONCLUSION

In conclusion Protestant OHRY respectfully requests the Surface Transportation Board grant the following relief:

1. Issuance of an Order requiring Applicant Delaware and Hudson Railway to retain trackage rights and continue local interchange service to and from the Owego Harford Railway, Inc, interchange track located at MP 236.1 on the NS Southern Tier Line at Owego, NY as a condition of any exemption or other relief from trackage rights granted to DH;
2. In the event the STB has granted the exemption, deem this Protest as a Petition to Revoke Exemption and revoke any exemption granted to the Petitioner Delaware and Hudson Railway Company in this matter and impose the same condition requested in number 1 above, and;
3. Any such other and further relief the Board deems just and proper.

Respectfully submitted,

Dated: October 20, 2004

A handwritten signature in black ink, appearing to read 'E. B. Lee', with a long horizontal flourish extending to the right.

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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DELAWARE AND HUDSON RAILWAY COMPANY, INC, DISCONTINUANCE OF  
TRackage RIGHTS BETWEEN LANESBORO, PA, AND BUFFALO, NY, IN  
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ALLEGANY, LIVINGSTON, WYOMING, ERIE AND GENESEE COUNTIES, NY

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VERIFIED STATEMENT OF STEVEN MAY

Steven C. May, states the following:

1. I am the President of the Owego Harford Railway, Inc, a Pennsylvania Corporation, (OHRY) and have been such since the formation of OHRY. I make this Verified Statement in that capacity.
2. OHRY is a Class III railroad duly authorized by the Interstate Commerce Commission. (*Owego Harford Railway, Inc – Modified Certificate*, ICC Finance Docket No. 32063) OHRY began operations May 1, 1992. OHRY maintains offices at 25 Delphine Street, Owego, NY 13827.
3. OHRY operates approximately 26.7 miles of track between Owego, New York and Harford Mills, New York located in Tioga and Cortland Counties, NY. The entire area served by OHRY consists of rural farmlands and small towns with a limited industrial base.
4. OHRY connects with the Southern Tier Line of the Norfolk Southern Railway (NS) at Owego, NY. OHRY interchanges with both the NS and the Petitioner Delaware and Hudson Railway, Inc (DH) at Owego, NY. The DH reaches Owego from Binghamton, NY a distance of approximately 23 miles over the trackage rights DH seeks to discontinue in this matter.
5. OHRY interchanges traffic to DH at Owego, NY. Interchange traffic moved by DH over the Owego interchange has in recent years included: rock salt from a nearby mine owned by Cargill, Inc, scrap metal from Upstate Shredding, LLC, and LPG gas moving to/from the New York LPG Storage gas storage facility.

6. Traffic moving over the Owego interchange to DH between OHRY and DH has ranged between 54 and 889 carloads annually over the last three years. Total OHRY traffic has ranged between 1,556 and 1,664 carloads annually over the same three year period. Carloads moved by DH have declined over the last three years while total OHRY carloadings have remained stable.
7. Since OHRY started operations in 1992 we have successfully attracted several industries to locate along our railroad or utilize transloading via truck to reach our rail service. Included are Norwesco a plastic manufacturer, Upstate Shredding a metals recycling facility, New York LPG Storage and Cargill, Inc, rock salt. We have worked closely with the Tioga County Industrial Development Agency to locate the industries along our rail line. These industries have resulted in the addition of jobs to the local communities and businesses to local tax rolls. OHRY has been active economic development in its area and has used service by two Class I railroad connections as one means of attracting additional businesses to its rail service.
8. Historically, OHRYs customers have benefited from connecting service of two Class I railroads the DH and Consolidated Rail Corporation (CR) and its successor on the Southern Tier Line, the NS during the twelve years OHRY has operated the rail line. The DH and its predecessor the Delaware and Hudson Railroad (D&H) have served Owego via trackage rights dating well before the formation of Conrail in 1976. The D&H and the Lehigh Valley Railroad (LV), a Conrail predecessor operated transfer trains between Binghamton and the LV major classification yard at Sayre, PA over some of the same trackage that is now part of the OHRY.
9. DH proposes to discontinue service to the Owego interchange via trackage rights upon approval of its exemption request by the STB. Further, DH proposes to substitute service under a Haulage Services Agreement with the NS wherein only the NS will actually provide service to the Owego interchange for a fee and transfer the traffic to the DH at its facility in East Binghamton, NY.
10. OHRY seeks to maintain existing DH interchange service to its Owego, NY interchange. DH has historically performed this service with a local train from

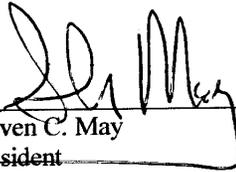
Binghamton, NY. Continuation of such service would be a minimal burden upon DH which currently provides service as needed, generally not more than once per week. Further, it would not substantially burden NS as owner of the Southern Tier Line as the DH local providing service only traverses approximately 23 miles of that line once per week or less. In the event traffic over the interchange increases DH is of course free to increase the frequency of service.

11. OHRY respectfully requests the STB order continued service to the Owego interchange by DH and retention of all necessary trackage rights to accomplish this by DH be imposed as a condition of any exemption the STB may grant herein.

VERIFICATION

I, Steven C. May , President of the Owego Harford Railway, Inc, hereby verify under penalty of perjury that the foregoing is true and correct.

Dated: October 19, 2004



Steven C. May  
President

CERTIFICATE OF SERVICE

I certify that on October 20, 2004, true copies of the foregoing "Protest of the Owego Harford Railway, Inc" and "Verified Statement of Steven May" filed by the Owego Harford Railway, Inc by first class mail, postage prepaid upon:

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